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In The Supreme Court of The United States

October Term, 1970

No. ~~1747~~ 70-204

KENNETH L. ZOLLMAN, *Petitioner*
v.
SYMINGTON WAYNE CORPORATION, a Corporation
and
GLOBE HOIST COMPANY, a Corporation, *Respondents*

AND

HOWARD F. LEISURE, *Petitioner*
v.
SYMINGTON WAYNE CORPORATION, a Corporation
and
GLOBE HOIST COMPANY, a Corporation, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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May 25, 1971

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The petitioners, Kenneth L. Zollman and Howard F. Leisure, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on February 9, 1971.

OPINION BELOW

The opinion of the Court of Appeals, reported in 438 F. 2d 28 (7th Cir. 1971), appears in the Appendix hereto. No opinion was rendered by the District Court for the Southern District of Indiana, Indianapolis Division.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on February 9, 1971. A timely petition for rehearing was denied on February 25, 1971, and this petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the application of Rule 50(b) of the Federal Rules of Civil Procedure in a case where witnesses differ regarding the physical facts and the principles established by the laws of science is unconstitutional in that such application of Rule 50(b) abridges Amendment Seven of the Constitution of the United States.

2. Whether the use of a state standard regarding a so-called "physical facts" rule in the application of Rule 50 (b) of the Federal Rules of Civil Procedure abridges the guaranty of a jury trial and the jury's role as the constitutional tribunal provided for trying facts in the federal courts pursuant to Amendment Seven of the Constitution of the United States.

3. Whether the sufficiency of certain evidence to raise a question of fact for the jury should be controlled by state law where federal jurisdiction is rested on diversity of citizenship.

4. Whether there is an issue of fact herein requiring the jury's determination such that the application of Rule

50(b) of the Federal Rules of Civil Procedure was an improper trying of facts by the appellate court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment Seven:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Code, Title 28:

Federal Rules of Civil Procedure, Rule 50(b). Motion for Judgment Notwithstanding the Verdict.

Whenever a motion for a directed verdict made at the close of all the evidence is denied or for any reason is not granted, the court is deemed to have submitted the action to the jury subject to a later determination of the legal questions raised by the motion. Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have the verdict and any judgment entered thereon set aside and to have judgment entered in accordance with his motion for a directed verdict; or if a verdict was not returned such party, within 10 days after the jury has been discharged, may move for judgment in accordance with his motion for a directed verdict. A motion for a new trial may be joined with this motion, or a new trial may be prayed for in the alternative. If a verdict was returned the court may allow the judgment to stand or may reopen the judgment and either order a new trial or direct the entry of judgment as if the requested verdict had been directed. If no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial.

STATEMENT OF THE CASE

An accident occurred in Kokomo, Indiana, on September 25, 1965 in the muffler shop owned and operated by plaintiff-appellee-petitioner herein Zollman. Both he and Leisure, also plaintiff-appellee-petitioner herein, were seriously injured when a car fell from a hoist manufactured by Globe Hoist Company, a division of Symington Wayne Corporation, both being defendants-appellants-respondents herein. The petitioners, as residents and citizens of Indiana, brought the instant action in a federal court in the Southern District of Indiana. The defendants-respondents Symington Wayne Corporation and Globe Hoist Company were named as corporations, organized and existing under the laws of the State of Maryland, being citizens of Maryland, with no places of business in Indiana, but doing business in the State of Indiana. The petitioners, alleging strict liability and negligence, proceeded on the theory that the hoist was defective in design, that the respondents were negligent in failing to furnish operating instructions, in failing to warn, in failing to provide fail-safe devices, in failing to inspect and test, and in carelessly and negligently manufacturing a hoist with lifting cross members that would move, when stability was essential to the operating principle. The jury denied recovery on strict liability, but found the respondents guilty of negligence. Respondents appealed from the denial of their motions for a directed verdict and for judgment notwithstanding the verdict. The court of appeals reversed the judgment of the district court and remanded the case with directions to enter judgment for the defendants. The basic issue was whether there was substantial evidence to prove that any defect in the hoist proximately caused the accident.

[*References herein are to Appellants' Appendix at the Court of Appeals.*]

The hoist in question has a rectangular frame made of I-beams, with upright posts at each corner. On top of the lateral I-beams are inverted V-rails which support a front and rear crossbar. These crossbars have rollers at each end which permit the bars to roll along the length of the V-rails. The crossbars are equipped with hinged jacks.

To operate the hoist a mechanic drives the car over the back I-beam and crossbar by means of removable ramps. The entire car is centered inside the rectangular frame which rests on the floor. The operator then rolls the rear crossbar under the rear of the car and attaches the jacks to the car's frame. He positions the front crossbar between the front wheels and bumper. Whether the proper use of the front crossbar includes attaching the jacks was a much-disputed point.

The operator then activates the electric hoist which uses cables at each corner to lift the entire rectangular frame and the car with it. The crossbars and jacks are the only points of contact with the frame of the car. When the car is up the wheels hang free, and the entire undercarriage of the car is exposed for motor, transmission, and muffler work.

On the day of the accident petitioner Zollman raised a car on the hoist. Petitioner Leisure, a customer in the shop stepped under the car with Zollman. At that moment, and while Zollman was tightening the last bolt, the front end of the car fell from the hoist onto the two men. [The facts stated in the above four paragraphs are taken from the opinion of the court of appeals. See p. 22-23 of Appendix hereto.]

Petitioners' case was based on Zollman's testimony about his operation of the hoist. He said that before the lift he checked the position of the front crossbar and pressed it back

against the front tires. (App. Vol. II, P. 1134-1137.) He also testified that the only operating instructions he got with the hoist said "do not use axle blocks" and that the only other information was wiring instructions. (App. Vol. I, P. 312-313, 211.) Petitioners also presented expert testimony and video-tapes based on tests of the hoist. These witnesses described how a front crossbar, positioned against the front tires, would slide forward up to nine inches as the car was lifted. Respondents' experts testified that the weight of the car on the crossbar, plus the bulk of the radiator bolt, combined to "lock" the crossbar behind the bolt. One of Respondents' experts testified that if the front member of the hoist should move with a car uplifted that it would be extremely dangerous. (App. Vol. II, P. 691-693.); that if testing should show movement of the front crossbar, that he would have had instructions for the operator to use jacks (App. Vol. II, P. 707.); and that no hoist manufactured in the United States was without a fail-safe device to control the hoist (App. Vol. II, P. 716.). One of petitioners' expert witnesses who had made tests for respondents, said that when the hoist is raised you can see the complete hoist shake (App. Vol. I, P. 18.) and that when he started to raise an automobile on the hoist the lifting crossbar moved forward (App. Vol. I, P. 22.); and that in all the tests the crossbar always jumped out from the tires from seven to nine inches. (App. Vol. I, P. 23-24.) He also testified he saw no instructions. (App. Vol. I, P. 13.) Another witness for petitioners testified that he operated a transmission shop in Long Island, New York and had installed a model 1075 hoist exactly like petitioner Zollman's; that Respondent Globe furnished no manual of instructions with the hoist; that he learned from experimenting how to keep from "losing a car" (App. Vol. I, P. 157-158.); that in three separate accidents the front cross member moved for-

ward and permitted the front of a lifted car to fall (App. Vol. I, P. 160.); and that there is a terrific vibration with the up and down lift of a car. (App. Vol. I, P. 161.) Respondent Globe's designer of its hoists testified that instructions should have been sent with the hoist (App. Vol. I, P. 340.); that Globe did not say anything by way of instruction or warning in respect to a satisfactory operation as related to the use of jacks (App. Vol. I, P. 345.); that Globe did not warn that a car position would result in an undesirable force component; that if the car was lifted the force component made possible a forward movement of the front bar, the car would drop, but no warning was given of this possibility and danger. (App. Vol. I, P. 346.) One of petitioners' expert witnesses testified that it would only take 25 pounds to slide the lifting rails out from under the automobile (App. Vol. II, P. 508.); that Globe's reliance on the principle of friction to prevent movement was very ineffective, would be a defect of design, making the hoist unreasonably dangerous to a user, (App. Vol. II, P. 514-515.); that he performed tests with the hoist; that these tests showed movement of the front crossbar when there should not have been movement and that the movement varied from 2 inches to 9 inches (App. Vol. II, P. 526.); that in test 3 the front bar moved out from under the car (App. Vol. II, P. 571-572.); that the tests proved that a reasonably safe hoist required a device to prevent the bar from moving forward. Finally, he also testified that the car would move a variable distance, when it shouldn't, and if enough tests were performed, the radiator support bolt once might not stop the forward motion of the front crossbar. (App. Vol. II, P. 576-577.)

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF AP-

PEALS ON THE SAME MATTER AND HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

In Slocum v. New York L. Ins. Co., 228 U.S. 364 (1912), this court stated, at pages 376-378:

> The real question is whether, in the direction given by the circuit court of appeals, there was an infraction of the 7th Amendment to the Constitution of the United States, which declares:
>
> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."
>
> That what was done may be clearly in mind it is well to repeat that, while on the trial in the circuit court, the jury returned a general verdict for the plaintiff, the circuit court of appeals, on an examination of the evidence, concluded that it was not sufficient to sustain the verdict, and on that ground directed a judgment for the defendant. In other words, the circuit court of appeals directed a judgment for one party when the verdict was for the other, and did this on the theory, not that the judgment was required by the state of the pleadings, but that it was warranted by the evidence. It will be perceived, therefore, that the court, although practically setting the verdict aside, did not order a new trial, but assumed to pass finally upon the issues of fact presented by the pleadings and to direct a judgment accordingly. If this was an infraction of the 7th Amendment, it matters not that it was in conformity with the state statute, or with the practice thereunder in the courts of the state, for neither the statute nor the practice could be followed in opposition to the Amendment, which, although not

applicable to proceedings in the courts of the several states, is controlling in the Federal courts.

The Constitution of the United States, as originally adopted, conferred upon this court, by art. 3, § 2, "appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as the Congress shall make;" but this and the absence of any provision respecting the mode of trial in civil actions were so generally regarded as endangering the right of trial by jury as existing at common law, and evoked so much criticism on that ground, that the first Congress proposed to the legislatures of the several states the 7th Amendment, which was promptly ratified. 1 Stat. at L. 21, 97; Story, Const. §§1763, 1768.

The adjudged cases dealing with the origin, scope, and effect of the Amendment are numerous and so comprehensive that little room for original discussion remains. A reference to some of them will show its true and settled meaning, and point the way to its right application here.

In United States v. Wonson, 1 Gall. 5; 20, Fed. Cas. No. 16,750, a case decided in 1812, and often cited with approval by this court, it was said by Mr. Justice Story, after quoting the words of the Amendment: "Beyond all question, the common law here alluded to is not the common law of any individual state (for it probably differs in all), but it is the common law of England, the grand reservoir of all our jurisprudence. . . . Now, according to the rules of the common law, the facts once tried by a jury are never re-examined, unless a new trial is granted in the discretion of the court before which the suit is depending, for good cause shown; or unless the judgment of such court is reversed by a superior tribunal, on a writ of error, and a venire facias de novo is awarded. This is the invariable usage settled by the decisions of ages."

In the instant case the circuit court of appeals directed a judgment for one party when the verdict was for the other

on the theory that it was warranted by the evidence. Granting that *Neely v. Eby*, 386U.S.317 (1967) removes any consideration of the power of the court of appeals to direct the entry of judgment for the defendant, petitioners herein argue that whatever remains of *Slocum* must be fought around the meaning of the term "evidence." The constitutional question with respect to the Seventh Amendment has reached the following formulation herein, When is a "physical facts" rule applicable by the court to remove evidence from the consideration of the jury? Petitioners contend that such a rule can only be applied constitutionally when the physical facts, scientific principles, and laws of nature involved in the case are undisputed and entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff. The formulation and application of this rule in the instant case is a euphemism for the reexamination by the court of appeals of facts tried by the jury below and is a weighing of evidence and a determining of contested issues of fact.

This court, in *Dick v. New York Life Ins. Co.*, 359 U.S. 437 (1959), held that where the plaintiff's evidence could support a jury conclusion that a gun might have fired accidentally, and once an accidental discharge was possible, a jury could rationally conceive of a number of explanations. The court noted, at p. 445-446, that "[The Court of Appeals] committed its basic error in resolving a factual dispute in favor of respondent that the shotgun would not fire unless someone or something pulled the triggers. Petitioner's evidence on this score, despite the 'tests' performed by the sheriff, could support a jury conclusion that the gun might have fired accidentally from other causes. Once an accidental discharge is possible, a jury could rationally conceive of a number of explanations of accidental death . . . "

The rule should be applied as stated in *Travelers' Indemnity Co. v. Parkersburg Iron & S. Co.*, 70 F. 2d 63 (4th Cir. 1934) at 64, 65: " . . . The rule is well settled, of course, that evidence contrary to established physical facts has no probative value. . . . But to justify the ignoring of evidence under this rule the evidence ignored must be utterly at variance with well-established and universally recognized physical laws and therefore inherently impossible. . . . The rule means merely that courts are not required to stultify themselves by giving serious consideration to what every man knows to be untrue. *It does not mean that they must determine for themselves, from the testimony of experts or otherwise, the truths of science which may be involved in cases before them, and ignore testimony that does not coincide with their conclusions.* (Emphasis added.) Questions of fact are questions for the jury; and they do not become questions for the court merely because their solution may require scientific knowledge or expert opinion." The court of appeals in the instant case took it upon itself to become the arbiter of the state of science in the face of lay and expert testimony below which presented many variables and involved much dispute regarding the conclusions to be drawn from scientific principles and physical facts.

The Eighth Circuit, in *Born v. Osendorf*, 329 F. 2d 669 (8th Cir. 1964), at 672, held that "no jury can be allowed to return a verdict upon oral testimony which is flatly opposed to physical facts, the existence of which is *incontrovertibly established.*" (Emphasis added.) The Tenth Circuit, in *Kansas City Public Service Co. v. Shephard*, 184 F. 2d 945 (10th Cir. 1950), at 947, held that " . . . in determining whether that general rule has controlling application with dispositive effect, a court should bear in mind that frequently unlooked-for results attend the meeting of interacting forces or circumstances, and that oftentimes im-

ponderables and variables difficult of solution present themselves. *The doctrine should be applied only where the evidence on which plaintiff relies is clearly contrary to some immutable law of physics or is hopelessly in conflict with one or more established and uncontroverted physical facts.*" (Emphasis added.) No immutable law of physics, nor any uncontroverted physical facts were present in the instant case.

These conflicts regarding the application of the "physical facts" rule to the removal of evidence from the province of the jury to weigh and examine and to determine contested issues of fact, including the state of science at the time of trial, pursuant to Amendment Seven of the Constitution of the United States justify the grant of certiorari to review the judgment below.

2. THE DECISION BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT: WHETHER THE SUFFICIENCY OF CERTAIN EVIDENCE TO RAISE A QUESTION OF FACT FOR THE JURY SHOULD BE CONTROLLED BY STATE LAW WHERE FEDERAL JURISDICTION IS RESTED ON DIVERSITY OF CITIZENSHIP.

The court of appeals herein rested its decision largely upon an appellate court decision in Indiana and a district court decision in the Eastern District, Louisiana, [*Connor v. Jones,* 115 Ind. App. 660, 59 N.E. 2d 577 (1945) and *Grant v. Cia Anonima Venezolana de Navagacion,* 228 F. Supp. 232 (E.D. La. 1964).] See p. 25 of Appendix hereto. Two quotes from Moore's Federal Practice, and the cases therein cited, summarize petitioners' position on this reason for requesting certiorari.

5 Moore's Federal Practice ¶ 38.10, at 102 (2d ed. 1969):

> In *Herron v. Southern Pacific Co.*, [(1931) 283 US 91, 51 SCT 383, 75 Led 857 . . .] a diversity case, the court ruled that a federal court could direct a verdict, when proper under common law principles, although under state law the issue had to be submitted to the jury. Although this case was decided prior to *Erie,* it has been followed since *Erie* [*v. Tompkins* (1937) 304 U.S. 64] by courts that have carefully considered the matter. Courts which have applied *Erie* in determining what issues are triable by a jury have not given due consideration to the provisions of Article III and the Seventh Amendment./The elements of plaintiff's prima facie case, or of defendant's defense, must be determined by applicable local law in a case involving only non-federal matters. But the sufficiency of certain evidence to raise a question of fact for the jury, or for the court where trial is without jury, should not be controlled by state law.

Moore and Fink, *Moore's Federal Practice,* Rules and Official Forms As Amended, 1968, p. 810-811:

> The right to a "jury" or "court" trial involves a federal matter, *Simler v. Conner* (1963) 372 U.S. 221 . . . that is to be determined by a proper construction of the Seventh Amendment, any federal statute giving a right of jury trial, Article III of the Constitution, and Rules 38 and 39. *Erie-Tompkins* does not govern. . . . In *Byrd v. Blue Ridge Rural Electric Cooperative* (1958) 356 US 525, 78 S Ct 893, 2 L ed2d 953, the Court held that the factual issue as to whether plaintiff was an employee of the defendant, within the state workmen's compensation act, so as to preclude suit against the defendant, was, like other issues, to be submitted to the jury, although under state law the issue was for the court, at least where the state rule was not announced as an integral part of the special relationship. Justice Brennan stated: "The federal system is an independent system for administering

justice to litigants who properly invoke its jurisdiction. An essential characteristic of that system is the manner in which, in civil common-law actions, it distributes trial functions between judge and jury and, under the influence - if not the command - of the Seventh Amendment, assigns the decisions of disputed questions of fact to the jury. [The Court did not intimate any view as to whether the issue was within the protection of the Seventh Amendment.] . . . It cannot be gainsaid that there is a strong federal policy against allowing state rules to disrupt the judge-jury relationship in the federal courts." 356 US 525, 537, 538. *Accord*: *Magenau v. Aetna Freight Lines* (1959) 360 US 273, 79 S Ct 1184, 3 L ed 2d 1224. /. . . ./ Since the Seventh Amendment preserves the right of jury trial as at common law, and forbids a re-examination of any fact tried by a jury "in any Court of the United States" other "than according to the rules of the common law," . . . , and the common law alluded to is the English common law, /811/ ¶38.08[5](4), the right to a jury trial and the scope of review may be different in a federal court than in a state court./ *Particularly is this true in Louisiana, which has the civil, rather than the common law, heritage.* (Emphasis added.)

In 5 Moore's Federal Practice ¶ 50.06, the author states, at p. 2348-2349: ". . . the divergency among the circuits continues, while the federal courts await authoritative pronouncement from on high. Many cases are to be found holding state law to be controlling. [The author cites many such cases at footnote 5.] And there is equally impressive authority sustaining the supremacy of the Federal Rule. [The author cites cases at footnote 6.] Some circuits reveal decisions both ways. [*Cites.*]"

The court of appeals herein applied an Indiana lower court decision to determine the sufficiency of the evidence, and referred for support to an opinion rendered by a federal court in the eastern district of Louisiana. As noted in Moore

and Fink, above, Louisiana has the civil, rather than the common law, heritage. In addition, the Indiana constitution provides, "In all civil cases, the right of trial by jury shall remain inviolate." 1 Burns Ind. Stat. Ann., Constitution of Indiana Art. 1, §20. The federal Constitution additionally prohibits the reexamination of any fact tried by a jury, than according to the rules of the common law, in any court of the United States. The standards in all three instances are meaningfully different.

These conflicts justify the grant of certiorari to review the judgment below.

3. THE COURT OF APPEALS HAS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO CALL FOR AN EXERCISE OF THIS COURT'S POWER OF SUPERVISION.

Petitioners' Statement of the Case *supra* lists some of the multitude of variables present in the evidence, concerning which variables both sides presented substantial evidence to the jury: the force components generated by different vehicles, the movement of the crossbar when properly used; the necessity for instructions, the necessity for a fail-safe device, the stability of the hoist in operation, past experience in the operation of this model hoist, the amount of force necessary to slide the crossbar out from under the raised automobile, the safety of the hoist's design, and the possibility that the radiator support bolt might not stop the forward motion of the front crossbar. In answer to all of these facts and expert opinions placed before the jury to examine and weigh, the court of appeals wrote: "Defendants argue that Zollman's testimony about positioning the front crossbar against the tires was not entitled to belief by the jury because it contradicted all the physical demonstrations

that the crossbar would not slide out from such a position and that the Pontiac could not have fallen from the hoist under such circumstances. Further, since plaintiff's case depends on the validity of Zollman's testimony, the trial judge erred in denying defendants' motion for a directed verdict. / We agree." Stated simply, the court of appeals held that since the car did not fall in the tests (physical demonstrations) that petitioner Zollman was not entitled to belief by the jury. This court has already rejected this reasoning in *Dick op. cit. supra*. The question in *Dick* and here is one of *probability* not *possibility*, one for the jury not the court. "The standards for granting a motion for judgment n.o.v., on which the constitutionality of such action depends, are the same as those governing the direction of a verdict. (Cites.) . . . Thus, the motion for judgment n.o.v. may be granted only when, without weighing the credibility of the evidence, there can be but one reasonable conclusion as to the proper judgment. (Cites.) Where there is conflicting evidence, or there is insufficient evidence to make a 'one-way' verdict proper, judgment n.o.v. should not be awarded. (Cites.) On considering the motion, the court must view the evidence in the light most favorable to the party who secured the jury verdict. (Cites.) And this approach governs the actions of appellate courts as well as trial courts. (Cites.)" 5 Moore's Federal Practice ¶50.07, 2355-2357. Viewing the evidence in the light most favorable to the petitioners, who secured the jury verdict, the court of appeals had to conclude that as a matter of law "the Pontiac could not have fallen from the hoist" in the face of the following facts and opinions which had been presented in evidence, in addition to the tests made with the Pontiac on a hoist:

1. No fail-safe device was provided;
2. No hoist manufactured in the United States is without a fail-safe device;

3. When the hoist is raised, the complete hoist shakes;
4. There is a terrific vibration with the up and down lift of a car on the hoist;
5. In all the tests the crossbar always jumped out from the tires from seven to nine inches;
6. If the front member of the hoist should move with a car uplifted, it would be extremely dangerous;
7. That a force component can be created when lifting a car which makes *possible* a forward movement of the front bar which would drop the car;
8. That Globe's reliance on the principle of friction to prevent movement is a defect of design making the hoist unreasonably dangerous to a user;
9. Petitioner Zollman was tightening a bolt under the Pontiac when it fell;
10. Only 25 pounds is needed to slide the lifting rails out from under the raised automobile on this hoist;
11. If enough tests were performed, the radiator support bolt *once might not* stop the forward motion of the front crossbar;
12. In three separate accidents involving the same model hoist in use in a transmission shop the front cross member moved forward and permitted the front of a lifted car to fall.

The above summary of only a portion of the evidence contained in the three volumes of Appellants' Appendix below illustrates how the court of appeals selected the following illogical and improper syllogism to totally support its direction of the entry of judgment for the defendants notwithstanding the verdict:

(1) In all physical demonstrations of an automobile raised on the hoist with the front crossbar against the tires, the crossbar would not slide out.

(2) Zollman testified that he placed the front crossbar against the tires.

(3) The Pontiac could not have fallen.

[All three above statements are paraphrased from the last paragraph of the opinion of the court of appeals on page 24-25 of the Appendix hereto.]

In order for the court of appeals' logic to be proper and constitutional, the statement numbered "(1)" above must be an undisputed physical fact, an undisputed scientific principle, or an immutable law of nature. To remove the case from the jury, it must, in addition, be the only method of analysis available to the jury. The court of appeals' logic is improper in that the first statement is not a universal negative such that the conclusion in the third statement is one of the nineteen valid forms of syllogism. In other words, the evidence does not support the "universality" of the physical demonstrations. See petitioners' summary of a part of the evidence, above, numbers 7, 11, and 12. The jury was therefore entitled to weigh the evidence to determine whether the Pontiac fell from the hoist because of respondents' negligence.

The jury might properly have considered the more complicated, non-syllogistic reasoning which the multitude of variables present in the evidence required, and might properly have used the reasoning approved by this court in *Dick op. cit. supra*. The court of appeals limited the methods of analysis available to the jury under the guise of a "physical facts" rule, which itself is logically and constitutionally valid in a very limited number of circumstances. Not only was the jury's functions of finding the facts thereby diminished, but its methods of weighing the evidence in finding these facts were limited to the method chosen by the court of appeals.

This court should grant this petition to review the opinion and judgment below in order that it might give guidance, pursuant to its power of supervision, to the court of appeals in the application of Rule 50(b).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,
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May 25, 1971

In the
United States Court of Appeals
For the Seventh Circuit

SEPTEMBER TERM, 1970 — SEPTEMBER SESSION, 1970

No. 17991
KENNETH L. ZOLLMAN,
Plaintiff-Appellee,
v.
SYMINGTON WAYNE CORPORATION, a Corporation; and GLOBE HOIST COMPANY, a Corporation,
Defendants-Appellants.
HOWARD F. LEISURE,
Plaintiff-Appellee,
v.
SYMINGTON WAYNE CORPORATION, a Corporation; and GLOBE HOIST COMPANY, a Corporation,
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

FEBRUARY 9, 1971

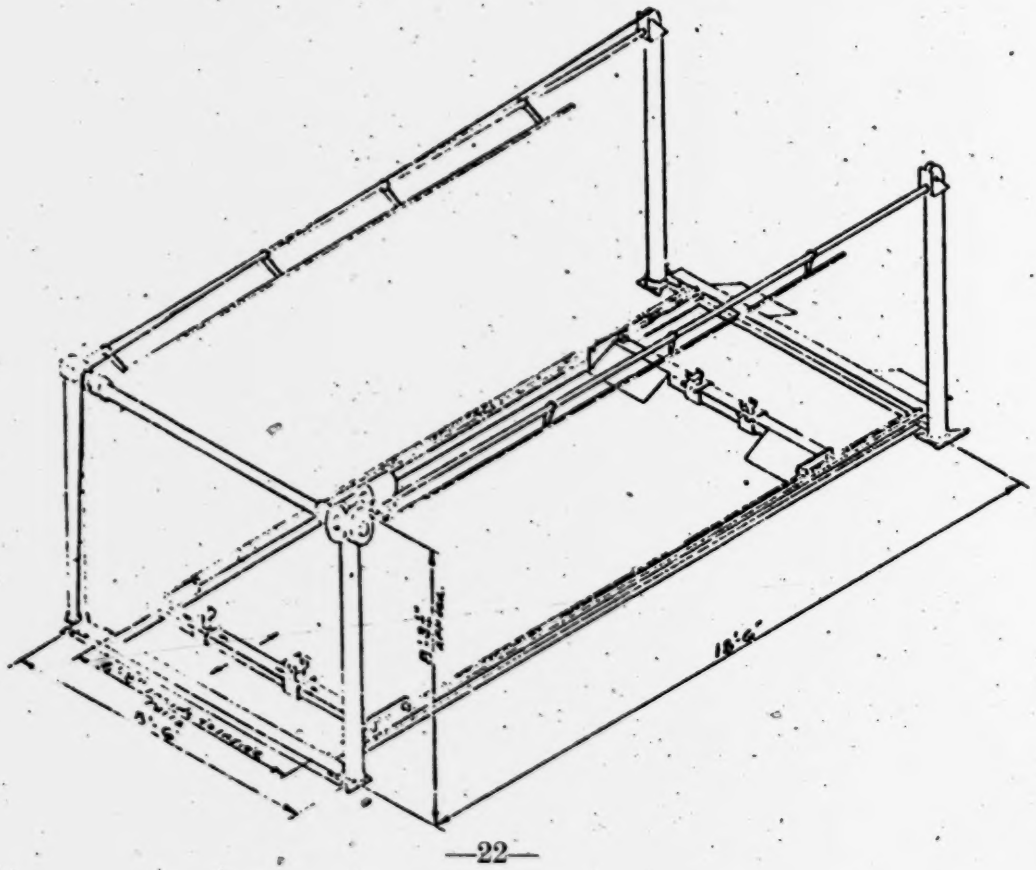
Before SWYGERT, *Chief Judge,* DUFFY, *Senior Circuit Judge,* and KERNER, *Circuit Judge.*

SWYGERT, *Chief Judge.* This is an appeal in a diversity action in which the plaintiffs, Kenneth L. Zollman and Howard F. Leisure, were awarded damages for personal injuries against Symington Wayne Corporation and Globe Hoist Company, a division of Symington Wayne. The suit arose out of an accident in Kokomo, Indiana, on September 25, 1965 in the B & Z Muffler Shop owned and operated by plaintiff Zollman.

Both plaintiffs were seriously injured when a car fell from a hoist manufactured by Globe. The plaintiffs,

alleging strict liability and negligence, proceeded on the theory that the hoist was defective in design. The jury denied recovery on strict liability, but found the defendants guilty of negligence. Defendants appeal from the denial of their motions for a directed verdict and for judgment notwithstanding the verdict. The basic issue, whether there was substantial evidence to prove that any defect in the hoist proximately caused the accident, raises questions which necessitate a detailed statement of the facts.

The hoist in question has a rectangular frame made of I-beams, with upright posts at each corner. On top of the lateral I-beams are inverted V-rails which support a front and rear crossbar. These crossbars have rollers at each end which permit the bars to roll along the length of the V-rails. The crossbars are equipped with hinged jacks. The following is a schematic illustration of the hoist.



To operate the hoist a mechanic drives the car over the back I-beam and crossbar by means of removable ramps. The entire car is centered inside the rectangular frame which rests on the floor. The operator then rolls the rear crossbar under the rear of the car and attaches the jacks to the car's frame. He positions the front crossbar between the front wheels and bumper. Whether the proper use of the front crossbar includes attaching the jacks is a much-disputed point.

The operator then activates the electric hoist which uses cables at each corner to lift the entire rectangular frame and the car with it. The crossbars and jacks are the only points of contact with the frame of the car. When the car is up the wheels hang free, and the entire undercarriage of the car is exposed for motor, transmission, and muffler work.

On the day of the accident Zollman raised a 1961 Pontiac on the hoist in order to replace the exhaust pipe and muffler. He then lowered the car and started the motor to test the exhaust. Hearing a leak, he again raised the car and proceeded to install a new gasket. As Zollman was about to complete the repairs, a customer, Howard Leisure, walked into the shop. Leisure stepped under the Pontiac to ask Zollman about a bill. At that moment, the front end of the car fell from the hoist, pinning the two men under it.

Plaintiffs' case is based almost entirely on Zollman's testimony about his operation of the hoist. He said that before the second lift he checked the position of the front crossbar and pressed it back against the front tires. He did not use the front jacks. Plaintiffs also presented expert testimony and videotapes based on tests of the hoist. These witnesses described how a front crossbar, positioned against the front tires, would slide forward a few inches as the car was lifted. Their explanation was that the car frame, which rests on the crossbar, slopes downward from the tires forward to the radiator bolt. It is plaintiffs' theory that, because the front crossbar slides a few inches forward when the car is lifted, it is possible that the bar somehow "jumped out" from under the frame and allowed the car to drop. This theory, however, was never substantiated by any of the numerous

tests performed by the expert witnesses. In no test were experts for either party able to dislodge the front crossbar from its final position against the radiator bolt. Various assaults on the raised car, from men shoving and rocking it to a hydraulic jack exerting hundreds of pounds of pressure, produced only one type of movement: the entire car would roll along the lateral I-beams but would not fall off the hoist.

Defendants made a direct attack on the credibility of Zollman's testimony. The evidence was clear and undisputed that if the crossbar was pushed against the front tires, as Zollman stated, there was no way, proven or hypothetical, for the car to fall off the hoist. Defendants' experts testified that the weight of the car on the crossbar, plus the bulk of the radiator bolt, combined to "lock" the crossbar behind the bolt. The possibility that the crossbar could have sheared off the bolt was contradicted by testimony that the radiator bolt, indeed the entire undercarriage of the car, was not damaged in the accident.

Defendants' explanation of the accident is based on the tests in which the car did fall from the hoist. In each test, the car was lifted with the front crossbar positioned under the front edge of the bumper. The car could be lifted to the top of the hoist in this manner, but a small amount of pressure on the front of the car would cause it to slide off the bar and fall to the ground.

Zollman testified he did not believe it was possible to lift a car with the bumper resting on the crossbar, but admitted that such a lift would be an obvious and dangerous misuse of the hoist. Defendants argue that Zollman must have inadvertently lifted the car with the front of the bumper on the crossbar; otherwise, there is no explanation for the accident.

The principal reason advanced by the defendants for a reversal is grounded on the proposition that unsupported evidence which is contrary to the physical facts and scientific principle has no probative value. Defendants argue that Zollman's testimony about positioning the front crossbar against the tires was not entitled to belief by the jury because it contradicted all the physical demonstrations that the crossbar would not slide out from such a position and that the Pontiac could not have fallen

from the hoist under such circumstances. Further, since plaintiffs' case depends on the validity of Zollman's testimony, the trial judge erred in denying defendants' motion for a directed verdict.

We agree. A review of the decisions in Indiana as well as in other jurisdictions convinces us that this is a proper case for application of the "physical facts" rule and that that rule requires discounting Zollman's testimony. The Appellate Court of Indiana has stated the "physical facts" rule as follows:

> It is well settled in this jurisdiction and elsewhere that the testimony of a witness which is opposed to the laws of nature, or which is clearly in conflict with principles established by the laws of science, is of no probative value and a jury is not permitted to rest its verdict thereon. . . . This rule is frequently applied to the testimony of one who says he did not see an object, which, if he had looked, in the very nature of things, he must have seen. *Connor* v. *Jones,* 115 Ind.App. 660, 669-70, 59 N.E.2d 577, 581 (1945) (citations omitted).

Other courts have held likewise. In *Atlantic Coast Line R.R.* v. *Collins,* 235 F.2d 805 (4th Cir. 1956), the appellate court reversed a judgment for plaintiff and directed a judgment for the defendant. The plaintiff, a railroad employee, testified he wrenched his back trying to operate a switch which he said was very difficult to move. The court held his testimony could not be credited in the face of evidence that the plaintiff had moved the switch many times the same night, and that other employees moved it easily after the injury. Similarly, a Louisiana district court refused to credit a plaintiff's account of an accident because the winch system was shown to be hydraulic, not electric as plaintiff's witnesses claimed. *Grant* v. *Cia Anonima Venezolana de Navegacion,* 228 F.Supp. 232 (E.D.La. 1964).

Most courts which refuse to apply the "physical facts" rule are faced with many variable factors about which no precise testimony could be given. Often these are automobile-accident cases, in which an expert's reconstruction of the "physical facts" of the accident is neces-

sarily based on inaccurate estimates of speed, periods of time, and distances. For examples, see *Baltimore & O. R.R.* v. *Daugherty,* 123 Ind.App. 373, 111 N.E.2d 483 (1953); *Granat* v. *Schoepski,* 272 F.2d 814 (9th Cir. 1959); *Kansas City Public Service Co.* v. *Shephard,* 184 F.2d 945 (10th Cir. 1950); and *Jarman* v. *Philadelphia-Detroit Lines,* 131 F.2d 728 (4th Cir. 1942).

In the present case, however, there are no such variables to diminish the persuasiveness of the physical facts. Plaintiffs and defendants performed numerous tests with the same or an identical car hoist and with the same or similar Pontiacs. The only variable which produced different results was the position of the front crossbar. When placed under the front edge of the bumper, the crossbar slid out with minimal pressure. When placed between the tires and the radiator bolt, the crossbar could not be dislodged. The inescapable conclusion is that Zollman's misuse of the hoist, rather than defective or negligent design of the hoist, caused the accident.

Plaintiffs suggest that defendants were negligent not to provide an instruction that the front jacks should always be used. Defendants admit that use of the front jacks provides a safer lift. But failure to use the jacks did not contribute to the accident, since Zollman must have lifted the automobile in what he acknowledged would be a dangerous manner. A manufacturer has no duty to warn against obvious misuses of a product under Indiana law. *Posey* v. *Clark Equipment Co.,* 409 F.2d 560 (7th Cir. 1969). Defendants' motion for judgment notwithstanding the verdict should have been granted.

The judgment of the district court is reversed, and the case is remanded to the district court with directions to enter judgment for the defendants.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeal for the Seventh Circuit.

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United States Court of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Thursday, FEBRUARY 25, 19 71

Before

Hon. LUTHER M. SWYGERT, Chief Judge

Hon. F. RYAN DUFFY, Sr. Circuit Judge

Hon. OTTO KERNER, Circuit Judge

KENNETH L. ZOLLMAN and HOWARD F. LEISURE,
Plaintiffs-Appellees,

No. 17991 vs.

SYMINGTON WAYNE CORPORATION and GLOBE HOIST COMPANY,
Defendants-Appellants.

Appeal From the United States District Court for the Southern District of Indiana, Indianapolis Division.

IT IS ORDERED by the Court that the petition for rehearing filed in the above-entitled case be, and the same is hereby denied.

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of May, 1971, three copies of this Petition for Writ of Certiorari were mailed, postage prepaid, to James J. Stewart and Terence L. Eads, Stewart, Irwin, Gilliom, Fuller & Meyer, 1200 Merchants Bank Building, Indianapolis, Indiana 46204, Counsel for the Respondents. I further certify that all parties required to be served have been served.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

70-204

No. ~~1141~~

KENNETH L. ZOLLMAN,
Petitioner

vs.

SYMINGTON WAYNE CORPORATION, a Corporation, and GLOBE HOIST COMPANY, a Corporation,
Respondents

and

HOWARD F. LEISURE,
Petitioner

vs.

SYMINGTON WAYNE CORPORATION, a Corporation, and GLOBE HOIST COMPANY, a Corporation,
Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1747

KENNETH L. ZOLLMAN,

Petitioner

vs.

SYMINGTON WAYNE CORPORATION, a Corporation, and GLOBE HOIST COMPANY, a Corporation,

Respondents

and

HOWARD F. LEISURE,

Petitioner

vs.

SYMINGTON WAYNE CORPORATION, a Corporation, and GLOBE HOIST COMPANY, a Corporation,

Respondents

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The respondents, Symington Wayne Corporation and Globe Hoist Company, respectfully submit that the petitioners have submitted no legitimate constitutional or other issues to require or merit review by this Court of the judgment and opinion of the United States Court of Appeals for the Seventh Circuit and that the Petition for Writ of Certiorari be denied.

OPINION BELOW.

Respondents agree with Petitioner's Statement of the opinion below.

JURISDICTION.

Respondents agree with Petitioner's statement of Jurisdiction.

QUESTIONS PRESENTED.

Respondents disagree with Petitioner's statement of the questions presented. Respondents respectfully submit that there are no legitimate constitutional questions involved nor is there any issue concerning the application of a state standard as opposed to a federal standard under Rule 50(b) of the Federal Rules of Civil Procedure.

The sole issue is:

Whether, the Court of Appeals properly applied the well-recognized common law "physical facts" rule in determining that there was no substantial evidence to prove that a defect in the hoist proximately caused the accident in question. The verdict of the jury was supported only by the incredulous testimony of the plaintiff, Zollman, and was contradictory not only of all the evidence introduced in the cause by either side, but by the laws of nature and principles of science and therefore had no probative value under both state and federal rules and cases. *Connor* v. *Jones* (1945), 115 Ind. App. 660, 59 N.E. 2d. 577; *Baltimore & Ohio R. Co.* v. *Daugherty* (1953), 123 Ind. App. 373, 111 N.E. 2d. 483; *Grant* v. *Cia Anonima Venezolanq de Navegacion* (E.D.La., 1964), 228 F. Supp. 232; *Watkins* v. *Continental Can Co.* (M.D.N.C. 1963), 225 F. Supp. 449; *Kansas Public Service Co.* v. *Shephard*

(10th Cir. 1950), 184 F. 2d 945; *O'Connor* v. *Pennsylvania Railroad Company* (2nd Cir., 1962), 308 F. 2d 911.

There is no unique or unusual constitutional law question presented under Amendment Seven of the United States Constitution other than is inherently, normally and obviously present any time an Appellate Court determines the sufficiency of the evidence according to the rules of common law.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Respondents agree that Amendment Seven to the United States Constitution and Rule 50 (b) of the Federal Rules of Civil Procedure have been correctly cited and set forth.

STATEMENT OF THE CASE.

Respondents submit that Petitioner's statement of the case is correct in so far as it goes, but submits the Petitioner's statement is not complete and omits certain crucial and necessary facts and evidence for the determination of the aforementioned issue.

Testimony referred to by Petitioner relative to the alleged danger involved in the design, failure to warn, failure to give adequate instruction and lack of a fail-safe feature is completely irrelevant to this petition.

There was *no testimony* either expert or otherwise, *as to any causal relationship between any of the above and the accident in question.* The only evidence *material* to the issue included in this petition is that concerning where the plaintiff positioned the automobile on the hoist prior to the accident. Petitioner's counsel admitted throughout the original trial of this cause and on the appeal before the Seventh Circuit that *if* the plaintiff positioned the automobile on the hoist with the front crossbar of the hoist under the front edge of the automobile bumper, then such would be obvious misuse of the product and a complete defense to any theory of liability. The additional evidence relating to this issue was as follows:

Plaintiff's own witness West testified in respect to observation of various tests, that the automobile would never come off the hoist even when vigorously pushed forward and backward or rocked backward or rocked side to side, *except* when the automobile was picked up with the front crossbar of the hoist barely engaging the edge of the front bumper (App. Vol. I, pp. 98-100).

Plaintiff's witness, SerVaas, in respect to his test, admitted that the car could be picked up by the very leading edge of the front bumper but that he was unable to forceably pull the front crossbar out from under the car when it was raised as plaintiff claimed he raised it. In other words, he was unable to duplicate the accident as plaintiff alleged it occurred despite extensive testing with the vehicle and equipment involved (App. Vol. I, p. 477). Plaintiff's witness Simpson, who ran numerous tests, admitted that the only time he was ever able to force the car from crossbar was when the front crossbar barely engaged the very edge of the bumper.

Defendant's witness, Dr. Manos, testified that had the front crossbar been placed against the tires and had the crossbar slipped out from under the vehicle there necessarily would have been scraping on the A-frame, radiator support bracket and bolt (App. Vol. II, pp. 822 and 889). In order to actually force the crossbar out from under the vehicle, it was necessary to use hydraulic jacks exerting great force, and marks were left on the top of the surface of the cross member and on the support bolt (App. Vol. II, p. 885).

Examination of the vehicle in question after the accident revealed no damage to the underneath in respect to the radiator support bolts, bumper bolts and there was no scrape marks on the radiator support or the A-frame (App. Vol. II, pp. 879-881). In none of the numerous tests run with the actual hoist and car in question or with identical hoist and car, was Dr. Manos able to force the crossbar out from underneath the vehicle when the crossbar was placed against the tires (App. Vol. II, p. 883).

Only when the vehicle was picked up so that the very edge of the bumper was engaged on the crossbar, would the vehicle move when force was applied to the vehicle (App. Vol. II, pp. 960-967). Lubrication to the parts of the hoist made no difference in the test results (App. Vol. II, p. 963).

In three separate tests the front crossbar was forceably moved with reference to the vehicle by the use of hydraulic jacks. First, the front crossbar was positioned under the A-frame of the vehicle. It took a force of 550 pounds to move the vehicle off the A-frame, where it

then came in contact with the radiator support bracket. When a force of 670 pounds was applied, the entire unit, the crossbar and vehicle, moved along the siderails (App. Vol. II, pp. 946-7).

In another test the crossbar was placed under the radiator bolt of the vehicle. The force necessary to move the vehicle off the crossbar was in the area of 1,800 to 2,000 pounds. (App. Vol. II, pp. 947-8). In another test the front bumper was placed squarely (not on the front edge) of the crossbar, and the forces required to move the vehicle off the crossbar was 770 pounds (App. Vol. II, p. 948). Dr. Manos further testified that in his expert opinion a man with a wrench could exert no more than approximately sixty (60) pounds pressure (App. Vol. II, p. 899). This evidence was uncontradicted.

Dr. Manos further testified in conclusion that when the crossbar was placed against the tires (as plaintiff testified) irrespective of the force applied the only movement resulting would be the sliding of the crossbar out to the radiator support bolt, but that the crossbar would not come out from under the vehicle "under any circumstances" (App. Vol. II, p. 1046). This, he testified, would be true even if all friction was removed between the crossbars and the siderails; that actually the friction between crossbar plates and the engaging flange of the siderail did not affect the security of the lift or the stability of the vehicle on the hoist, as demonstrated by his tests (App. Vol. II, pp. 1046-47). When the crossbar was under the radiator bolt it was "very secure" as it was when the bumper bolts were squarely on top of the lifting surface (App. Vol. II, p. 1047).

He testified unequivocally that the vehicle would never come off the lift with the front bar against the tires, whether it was fully raised or at a lower position; that the force exerted by a mechanic working on the vehicle in such a position would not be as much as one-tenth of of the force as he exerted on the vehicle in his attempt to force the vehicle off the crossbar in his tests (App. Vol. II, p. 1048).

Dr. Manos explained that, as designed, if any forces are applied to the vehicle while the vehicle is on the lift that the crossbar *and* vehicle will simply move along the siderails rather than off of the hoist (App. Vol. II, p. 1051).

Dr. Manos expressed the opinion as a consequence of all of his investigation and testing that at the time of the accident the front crossbar was under the very edge of the bumper in an obviously dangerous and precarious position (App. Vol. III, p. 294) (App. Vol. II, p. 1057).

All of this was because of the frictional forces involved. Frictional forces are, of course, natural, physical forces. The frictional force between the motor vehicle and the crossbar were simply many times greater than those between the crossbars and the siderails. Consequently, when forces were applied to the automobile it was simply caused to move safely along the siderails securely supported by the crossbars, *except* when the crossbar was improperly positioned under the curved *edge* of the bumper in an admittedly obvious and dangerous manner. Even then, the vehicle could be raised, but it could be forced from the hoist with minimal effort.

RESPONSE TO REASONS FOR GRANTING THIS WRIT.

1. The Decision Below Does Not Conflict With The Decisions Of Other Courts Of Appeals And Has Not Decided A Federal Question In Conflict With Applicable Decisions Of This Court.

The case of *Slocum* v. *New York L. Insurance Co.*, 228 U.S. 364 (1912), is inapplicable to the issue on the Petition for Writ of Certiorari and as admitted by Petitioner, this Court's decision in *Neely* v. *Eby*, 386 U.S. 317 (1967), clearly establishes the power of the Court of Appeals to direct an entry of judgment for this defendant. In the *Neely* case the Court discusses Rule 50 (b) and the trial court's right to enter a judgment notwithstanding the verdict. The Court states at pages 321 and 322:

> "The question here is whether the Court of Appeals, after reversing the denial of a defendant's Rule 50 (b) motion for judgment notwithstanding the verdict, may itself order dismissal or direct entry of judgment for defendant. As far as the Seventh Amendment's right to jury trial is concerned, there is no greater restriction on the province of the jury when an appellate court enters judgment n.o.v. than when a trial court does; consequently, there is no constitutional bar to an appellate court granting judgment n.o.v. See *Baltimore & Carolina Lines, Inc.* v. *Redman supra.* Likewise, the statutory grant of appellate jurisdiction to the courts of appeals is certainly broad enough to include the power to direct entry of judgment n.o.v. on appeal".

Petitioner suggests that the "physical facts" rule can only be applied when the physical facts, scientific principles and laws of nature are undisputed and entirely inconsistent with and opposed to testimony necessary to make a case for the plaintiff. Respondents respectfully submit that such a standard accurately describes the facts and evidence of this case and the Seventh Circuit correctly applied that standard. (It is a "physical fact" that water won't run up-hill. This was demonstrated by all of the evidence. Plaintiff's testimony to the contrary was therefore incredulous and would not support the verdict.)

The cases cited by the petition from other jurisdictions are not in conflict with the opinion below but are clearly distinguishable.

The case of *Dick* v. *New York Life Insurance Co.*, 359 U.S. 437 (1959), involved a factual dispute, where a jury could rationally conceive of a number of explanations for the accidental death. In response to this evidence, the respondent had evidence of "tests" which consisted of no more than the Sheriff testifying that after the death, he dropped the gun a number of times and that the trigger did not release on any of the occasions. This Court found error because despite these so called "tests", the petitioner had relevant evidence that an accidental discharge was possible and that with this evidence the jury could rationally conceive of a number of explanations of accidental death.

The reasoning of the *Dick* case is clearly not analogous to this case at bar. In this case, there was no evidence whatsoever that it was possible to cause the automobile to drop from the hoist when the crossbar was back

against the front tires. Even plaintiff's experts could never get the automobile to drop from the hoist under those circumstances. Unlike the *Dick* case, not only did the respondents (defendants) introduce evidence of numerous scientific tests, but the petitioners themselves introduced evidence of the same type of tests and their experts testified that they also could never get the automobile to drop from the hoist when the crossbar was back against the front tires. Moreover, none of petitioner's experts testified that in their opinion the accident happened while the crossbar was back against the front tires as testified to by the plaintiff, Zollman. In summary, all tests of all the experts clearly demonstrated that it was impossible because of the frictional forces and principles involved for the automobile to fall from the hoist in the way testified to by the plaintiff, Zollman, and that the only way the automobile could be caused to fall from the hoist was when the front crossbar was positioned under the very front edge of the bumper, *which admittedly involved a misuse of the hoist.*

In the case of *Travelers' Indemnity Co.* v. *Parkersburg Iron & S. Co.* (4th Cir. 1934), 70 F. 2d 63, the Court correctly held that the rule was not applicable because in that case the evidence of the experts for the plaintiff and the defendant as to how the accident happened were conflicting and the jury had the right to decide which experts they were going to believe and which expert testimony appeared to be consistent with the other testimony of the other witnesses. Again, this situation is not present in the case at bar and is clearly not analogous.

Again in *Born* v. *Osendorf* (8th Cir. 1964), 329 F. 2d 669, the Court correctly states the rule that a verdict

cannot be based on evidence which cannot possibly be true, is inherently unbelievable, or is opposed to natural laws. In that case the only physical facts involved related to the location of debris, the absence of skid marks and the points of damage to the vehicle. The Eighth Circuit found that these facts alone, left too many variables and were not sufficient to show that the plaintiff's theory was impossible.

The same reasoning is found in *Kansas City Public Service Co.* v. *Shephard* (10th Cir. 1950), 184 F. 2d 945, where the Court refused to apply the rule because of certain variables and reasserted that the doctrine should be applied only where the evidence on which the plaintiff relies is clearly contrary to some immutable law of physics or is hopelessly in conflict with one or more established and uncontroverted physical facts.

Thus, we are not here confronted with a conflict in the decisions of various circuits or the decisions of this Court. All the cases cited by the Petitioner are reconcilable with the Seventh Circuit's decision in this case and do not conflict with the "physical facts" rule generally. The variance in the decisions is simply in respect to the application of the rule under circumstances not analogous to the case at bar. This point is clearly stated by the Seventh Circuit in the opinion below, set forth in the appendix at Pages 25 and 26 of the Petition for Writ of Certiorari, where the Court states:

> "Most Courts which refuse to apply the 'physical facts' rule are faced with many variable factors about which no precise testimony could be given. Often these are automobile-accident cases, in which the expert's reconstruction of the 'physical facts' of

the accident is necessarily based on inaccurate estimates of speed, periods of time, and distances."

The *absence of such variables* in *this* case is significantly noted by the Seventh Circuit:

"In the present case, however, there are no such variables to diminish the persuasiveness of the physical facts. Plaintiffs and defendants performed numerous tests with the same or an identical car hoist and with the same or similar Pontiacs. The only variable which produced different results was the position of the front crossbar. When placed under the front edge of the bumper, the crossbar slid out with minimal pressure. When placed between the tires and the radiator bolt, the crossbar could not be dislodged. *The inescapable conclusion is that Zollman's misuse of the hoist, rather than defective or negligent design of the hoist, caused the accident.*" (Emphasis supplied.)

2. The Decision Below Did Not Decide A Question Of Federal Law And The Determination Of The Question Of Sufficiency Of The Evidence By The Circuit Court Of Appeals Was Not Controlled By State Law.

The Seventh Circuit Court of Appeals did not rest its decision solely upon an Appellate Court decision in Indiana or upon the law of any particular State. Reference was made to the Indiana decision and other State Court decisions simply as an example of universally accepted common law principle.

There is no real issue here as to whether the determination of the questions of sufficiency of certain evidence to raise a question of fact should be controlled by State law where Federal jurisdiction is based on diversity of citizenship. There may be a variation in the State law of

many jurisdictions as to the proper standard to be applied. Some states speak in terms of "scintilla of evidence"; other states talk about "substantial evidence"; some states specifically have ruled that a particular issue is one of law while other states have held that same issue to be one of fact. There are simply no conflicting rules involved here. The "physical facts" rule as applied by the Seventh Circuit is the law of Indiana and is quite universally recognized in the Federal Courts and elsewhere.

In the trial of this case and on appeal before the Seventh Circuit, the petitioners did not argue with the "physical facts" rule or the statement of the rule but only argued as to its application. All the cases cited by the petitioners or respondents before the Seventh Circuit Court of Appeals and cited to this Court do not vary as to the definition of the rule or its affect. This general rule, and the power of the Court is clearly stated in *Kansas Public Service Co.* v. *Shephard* (10th Cir. 1950), 184 F. 2d 945, 947, cited by the petitioner:

> "And where natural laws of physics or uncontroverted physical facts speak with such commanding force that they completely overcome and reduce to sheer absurdity the evidence offered by plaintiff to the contrary, the Court should direct a verdict against plaintiff, or make a finding against him, depending on whether the case is being tried to a jury or to the Court without a jury."

There is nothing unique about the way this rule is stated by the Indiana Courts or by the Courts of any other State or Federal jurisdiction, as suggested by the petitioners. Not once at the trial of this case or before the Seventh Circuit Court of Appeals did petitioner ever

object or argue that the "physical facts" rule did not exist or that there was a difference in the rule among the various jurisdictions or that the rule as stated by the Indiana Courts presented a different standard than that required by the Federal Court system. Petitioners are obviously at this eleventh hour grasping at straws.

This question of sufficiency of evidence and the application of a state versus a federal standard was discussed in *O'Connor* v. *Pennsylvania Railroad Company* (2nd Cir., 1962), 308 F. 2d 911. The Court finds the rules to be substantially similar and then discusses the relationship between "substantial" evidence test of the Federal Courts and the "physical facts" rule. The Court states at pages 914 and 915:

> "As we have already stated, this action was brought in a federal court by reason of the diverse citizenship of the parties; the substantive questions of negligence law are governed by the laws of the state of New York. The question whether the sufficiency of evidence to take the case to the jury is to be controlled by state or federal principles has recently been left open by the Supreme Court. See *Dick* v. *New York Life Ins. Co.*, 359 U.S. 437, 444-445, 79 S. Ct. 921, 3 L. Ed. 2d. 935 (1959); 2B Barron & Holtzoff, Federal Practice and Procedure §§ 871.1, 1072 (1961). *We need not decide that question because we find that the federal and state standards are substantially similar.* See *Presser Royalty Co.* v. *Chase Manhattan Bank*, 272 F. 2d 838, 840 (2d Cir. 1959). (Emphasis supplied.)
>
> "The propriety of granting or denying a motion for a directed verdict [or for judgment *non obstante veredicto*] is tested both in the trial court and on appeal by the same rule. The trial court must view the evidence and all inferences most favorably to

the party against whom the motion is made. The reviewing court must do the same with respect to a judgment entered on a directed verdict or the denial of a motion for a directed verdict or a judgment entered notwithstanding the verdict. 2B Barron & Holtzoff, Federal Practice and Procedure, § 1075 at 378 (1961). In granting such a motion for a judgment notwithstanding the verdict, and in affirming it on appeal, the function of the jury is not usurped. The jury is simply not being permitted to make unreasonable findings of fact. The case is withdrawn from them 'as a matter of law' because no jury could reasonably bring in a verdict for the opponent of the moving party. To decide upon the propriety of granting this motion, the court looks to the substantial evidence tending to bolster the case of the non-moving party and draws all reasonable inferences therefrom. *But the evidence cannot properly be deemed substantial nor the inferences reasonable if they are contrary to proven physical facts. The inferences which may be drawn must be within the range of reasonable probability, Ford Motor Co.* v. *McDavid,* 259 F. 2d. 261 (4th Cir.) cert. denied. 358 U.S. 908, 79 S. Ct. 234, 3 L. Ed. 2d. 229 (1958) *and must not be at war with undisputed facts.*"

This analysis by the Second Circuit Court of Appeals clearly describes the proper and correct analysis applied by the Seventh Circuit in this case at bar.

3. The Court Of Appeals Has Not Departed From Accepted And Usual Course Of Judicial Proceedings As To Call For An Exercise Of This Court's Power Of Supervision.

In Part 3 of their argument for granting the Writ, petitioners again attempt to cloud the issue by recitation of facts concerning the dangerous nature of the hoist.

Such facts are in no way material or relevant to the issues before this Court. Respondents do not admit that the evidence showed the hoist was a dangerous or defective instrumentality because of any failure to have a fail safe device or because of any warnings or instructions, or failure to give same. However, such evidence even if true is completely irrelevant and immaterial here just as it was at the trial and before the Seventh Circuit Court of Appeals. This hoist in question could have been the most dangerous and defective hoist ever manufactured, but the respondents, would still not be liable *unless such dangerous or defective condition proximately caused the injuries to the petitioners. There was no evidence of any such casual relationship; to the contrary, the evidence conclusively showed that the cause of the injuries was the misuse of the hoist.* Again, as previously stated, the issue clearly boils down to whether the plaintiff raised the automobile with the front crossbar of the hoist against the front tires of the automobile or whether the plaintiff raised the automobile with the front crossbar of the hoist under the very front edge of the bumper of the automobile which would clearly and admittedly be *misuse* of the product and an absolute defense.

This is clearly a case "where natural laws of physics or uncontroverted physical facts speak with such commanding force that they are completely overcome and reduce to sheer absurdity the evidence offered by the plaintiff to the contrary".

The Seventh Circuit, after careful review of all of the evidence, could find no *credible* evidence to support the verdict. They further found that the uncontradicted

credible evidence and "physical facts" clearly demonstrated that the accident was caused by a "misuse" of the product. They were therefore quite properly constrained to direct the lower court to do what he should have done in the first place, enter a judgment for the defendant.

Respectfully submitted,

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CERTIORARI DENIED N.C.R.